A

PP v. MUHAMMAD KASYFULLAH KASSIM

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
VERNON ONG LAM KIAT JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: W-05(H)-190-05-2016]
4 OCTOBER 2016

C ***CRIMINAL LAW:*** *Penal Code – Section 130J(1)(b) – Giving support to commission of terrorist act involving use of firearms – Sentence – Adequacy – Sentence of five years' imprisonment – Whether too lenient – Public interest – Whether given due consideration – Whether more deterrent sentence ought to be imposed*

D ***CRIMINAL PROCEDURE:*** *Sentencing – Adequacy – Giving support to commission of terrorist act involving use of fire arms – Whether a serious crime – Whether warranting severe punishment – Sentence of five years' imprisonment – Whether too lenient – Whether inadequate*

The respondent was charged with an offence under s. 130J(1)(a) of the Penal Code for giving support to a terrorist group called the Islamic State ('IS'), and
E alternatively under s. 130J(1)(b) thereof, for giving support to the commission of a terrorist act involving the use of firearms. The respondent pleaded guilty to the alternative charge and was thus convicted under s. 130J(1)(b) which carries a mandatory term of imprisonment for life or imprisonment for a term not exceeding 30 years or with fine. Having considered the mitigation and the surrounding circumstances, the trial judge
F sentenced the respondent to five years' imprisonment. Dissatisfied with the adequacy of the sentence, the prosecution ('the appellant') filed an appeal to this court. In praying for a deterrent sentence, the appellant submitted, *inter alia*, that: (i) the sentence handed down by the court below did not reflect the seriousness of terrorist activities that are spreading and causing
G problems globally; (ii) the sentence further did not take into account public interest; and (iii) by participating in the war in Syria using firearms, the respondent had contributed to the carnage and turmoil and placed public lives in utter chaos.

H **Held (setting aside sentence of five years' imprisonment; substituting it with an imprisonment of 12 years)**
Per Zamani A Rahim JCA delivering the judgment of the court:

(1) The power of sentencing given to a trial court is discretionary and in order to disturb the sentence imposed, an appellate court must be
I convinced that the trial judge had erred in applying the correct principles of sentencing or had embarked on some unauthorised or extraneous

exercise of discretion. On pleading guilty, the accused is normally given credit or discount between one quarter and one third of what otherwise would have been the sentence. In this case, the trial judge had exercised his discretion to grant the discount to the respondent, though the percentage of the discount was not indicated. However, not in every case of pleading guilty was the accused entitled as a rule of thumb to an automatic reduction of sentence. (paras 18 & 19)

(2) The gist of the charge against the respondent was his involvement in the jihadist, militant movement of the IS. Its movement has been characterised by extreme violence and suicide bombings. It is a menace to the international community and its threat and extremist religious ideologies is no exception to Malaysia. In imposing the sentence of five years' imprisonment on the respondent, the trial judge was persuaded and influenced by a lenient sentence passed on in the case of *PP v. Ummi Kalsom Bahak*. However, the factual matrix in the case of *Ummi Kalsom Bahak* could not be used as a barometer to gauge for the imposition of a proper custodial sentence on the respondent. The respondent was a former IS fighter and combatant whereas in *Ummi Kalsom Bahak*'s case, the offence was giving support to the commission of a terrorist act. The case of *Ummi Kalsom Bahak* was not a persuasive authority on sentence against the respondent. (paras 20-22)

(3) The trial judge had also erred when His Lordship was of the view that the prosecution would face a very difficult task to collect the evidence from Syria and Istanbul to prove the charge against the respondent in the event of a full trial. Such proposition by the High Court Judge was 'a pure conjecture and unwarranted'. While in Syria, the respondent had attended an army training and participated in a series of battles using firearms and had performed sentry duty at the housing area of the Jihadists. The respondent was also actively involved on social media application by downloading his pictures to inspire and entice new supporters or sympathisers. (paras 23-25)

(4) The sentence passed must take into account the public interest factor. All the more so when the crime involved violence and horrific acts of cruelty by IS militant. This must be the number one factor to be placed in the mind of the sentencing court. The sentence imposed must not only serve as a deterrence to the respondent but also to deter others from joining or supporting the IS terrorist acts or suicide bombings and terrorism. The conduct of the respondent in supporting the IS militant group is a very serious criminal offence. It should reflect the public abhorrence against such crime and warrant a severe punishment. (paras 26 & 30)

(5) Having regard to the facts and circumstances of this case, and the established principles on sentencing, in particular the public interest factor, where Malaysia is a primary target location for IS terrorists attacks, this court could not compromise with their terrorism activities and the sentence to be imposed must not merely be a tap on the wrist. The five years imprisonment imposed was manifestly inadequate. (para 31)

Bahasa Malaysia *Headnotes*

Responden dituduh dengan kesalahan di bawah s. 130J(1)(a) Kanun Keseksaan kerana memberi sokongan kepada kumpulan pengganas Islamic State (IS), dan secara alternatif, di bawah s.130J(1)(b) Kanun yang sama kerana memberi sokongan kepada tindakan pengganas yang melibatkan penggunaan senjata api. Responden mengaku salah terhadap pertuduhan alternatif dan disabitkan di bawah s. 130J(1)(b) yang membawa hukuman mandatori penjara seumur hidup atau penjara untuk tempoh tidak lebih dari 30 tahun atau dengan denda. Setelah mempertimbangkan mitigasi dan hal keadaan kes, hakim bicara menjatuhkan hukuman lima tahun penjara ke atas responden. Tidak berpuas hati dengan kepadanan hukuman, pihak pendakwaan ('perayu') memfailkan rayuan ke mahkamah ini. Dalam memohon hukuman pencegahan, perayu menghujahkan, antara lain, bahawa (i) hukuman yang dijatuhkan mahkamah di bawah tidak mencerminkan keseriusan kegiatan keganasan yang semakin menular dan menjadi masalah global; (ii) hukuman juga tidak mengambilkira kepentingan awam dan; (iii) dengan mengambil bahagian dalam peperangan di Syria menggunakan senjata api, responden telah menyumbang kepada pembunuhan beramai-ramai serta mencetuskan huru-hara dan menyebabkan kehidupan rakyat menjadi kucar-kacir.

Diputuskan (mengetepikan hukuman lima tahun penjara; menggantikan dengan hukuman 12 tahun penjara)
Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Kuasa hukuman yang diberi kepada mahkamah bicara adalah mengikut budi bicara, dan untuk mengganggu hukuman yang telah dijatuhkan, mahkamah rayuan perlu yakin bahawa hakim bicara terkhilaf apabila mengguna pakai prinsip-prinsip hukuman atau telah memulakan tindakan yang salah dan tidak dibenarkan. Berkenaan pengakuan salah, tertuduh biasanya diberi kredit atau pengurangan hukuman. Dalam kes ini, hakim bicara telah melaksanakan budi bicaranya untuk membenarkan pengurangan hukuman responden, walaupun peratusan pengurangan tidak dinyatakan. Walau bagaimanapun, tidak semua kes pengakuan salah memberikan hak pengurangan hukuman kepada tertuduh.

(2) Intipati pertuduhan terhadap responden adalah penglibatannya dalam pergerakan jihad dan militan IS. Pergerakannya adalah bercirikan keganasan melampau dan pengeboman berani mati. Ia adalah satu ancaman kepada masyarakat antarabangsa dan Malaysia tidak terkecuali daripada gertakan serta ideologi agama melampaunya. Dalam menjatuhkan hukuman penjara lima tahun atas responden, hakim bicara terpengaruh dengan hukuman ringan dalam kes *PP v. Ummi Kalsom Bahak*. Walau bagaimanapun, fakta matrik kes *Ummi Kalsom Bahak* tidak sepatutnya digunakan sebagai kayu pengukur bagi menentukan hukuman tahanan yang sesuai atas responden. Responden adalah bekas pejuang IS dan kombatan sementara dalam kes *Ummi Kalsom Bahak*, kesalahan adalah memberi sokongan kepada kelakuan kegiatan pengganas. Kes *Ummi Kalsom Bahak* bukan autoriti berpengaruh atas hukuman terhadap responden.

(3) Hakim bicara juga telah khilaf apabila beliau berpendapat bahawa pihak pendakwaan akan menghadapi tugas yang amat sukar untuk mengumpul keterangan daripada Syria dan Istanbul bagi membuktikan pertuduhan terhadap responden dalam perbicaraan penuh. Cadangan sebegitu oleh Mahkamah Tinggi amat rambang dan tidak wajar. Semasa di Syria, responden telah menghadiri latihan tentera dan mengambil bahagian dalam pertempuran menggunakan senjata api dan telah melakukan tugas sentri di kawasan perumahan ahli-ahli jihad. Responden juga agak aktif dalam penglibatannya di media sosial dengan menunjukkan gambar-gambarnya untuk memberi inspirasi dan menarik penyokong baru.

(4) Hukuman yang dijatuhkan perlu mengambil kira faktor kepentingan awam. Lebih-lebih lagi apabila jenayah itu melibatkan keganasan dan perbuatan ngeri oleh militan-militan IS. Ini sepatutnya menjadi faktor pertama yang perlu berada dalam fikiran mahkamah yang menjatuhkan hukuman. Hukuman yang dikenakan bukan sahaja perlu mencegah responden tetapi juga menghalang orang lain daripada menyertai atau menyokong kegiatan pengganas IS atau pengeboman berani mati atau keganasan. Tingkah laku responden menyokong kumpulan militan IS adalah kesalahan jenayah yang serius. Hukuman harus mencerminkan kebencian awam terhadap jenayah sebegitu dan mewajarkan hukuman yang keras.

(5) Mengambil kira fakta dan keadaan kes ini, serta prinsip-prinsip yang dibuktikan berkenaan hukuman, khususnya faktor kepentingan awam, di mana Malaysia adalah lokasi sasaran utama untuk serangan keganasan IS, mahkamah ini tidak boleh berkompromi dengan aktiviti keganasan mereka dan hukuman yang dikenakan tidak boleh lembut atau ringan. Penjara lima tahun yang dijatuhkan adalah jelas tidak memadai.

A **Case(s) referred to:**
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Costen (1989) 11 Cri App (S) CA 182 ***(refd)***
Ganesan Nachiappan & Ors v. PP [2000] 3 CLJ 302 CA ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
B *PP lwn. Abdul Halim Ishak & Satu Lagi [2013] 9 CLJ 559 CA* ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP lwn. Mohd Anwar Azmi & Yang Lain (Criminal Appeal No: 45-50-46-16-2015) (Unreported) ***(refd)***
PP v. Mohd Fazelan Md Khuzeh [2015] 9 CLJ 221 CA ***(refd)***
C *PP v. Muamar Gadaffi Mohamad Shafawi (Criminal Appeal No: W-05(H)-87-02-2016) (Unreported)* ***(refd)***
PP v. Nazarudin Ahmad & Ors [1993] 2 CLJ 543 HC ***(refd)***
PP v. Ravindran & Ors [1992] 1 LNS 47 HC ***(refd)***
PP v. Rohaimi Abd Rahim & Satu Lagi (Criminal Appeal No: W-05(H)-83-02-2016) (Unreported) ***(refd)***
D *PP lwn. Ummi Kalsom Bahak [2015] 7 CLJ 503 HC* ***(dist)***
R v. Ball (1951) 35 Cr App R 164 ***(refd)***
R v. Ipeelee [2012] 1 SCR 433 ***(refd)***
R v. Sargeant (1974) 60 Cr App R 74 ***(refd)***
Yusmarin Samsudin v. PP [1999] 4 CLJ 391 CA ***(refd)***

E **Legislation referred to:**
Criminal Procedure Code, s. 305
Penal Code, ss. 34, 109, 130F, 130G(a), (c), 130J(1)(a), (b), 130P, 511

For the prosecution - Nurshafini Mustafha; DPP
For the respondent - Azizzul Shariman Mat Yusoff; M/s Azizzul & Ariff

F *[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45(SO)-13-02-2015 (varied).]*

Reported by Suhainah Wahiduddin

G **JUDGMENT**

Zamani A Rahim JCA:

Introduction

[1] The respondent was charged with two counts of offences in the H alternative, firstly, by giving support to the terrorist group, Islamic State (IS) and secondly, by giving support to the commission of a terrorist act involving the use of firearms, the offences under s. 130J(1)(a) and s. 130J(1)(b) of the Penal Code respectively. The charges read as follows:

I The Principal Charge

Bahawa kamu antara 28.12.2013 hingga 7.4.2014 dengan pengetahuan, telah memasuki Syria dengan menaiki pesawat melalui Lapangan Terbang Antarabangsa Kuala Lumpur di dalam Daerah Sepang, dalam Negeri Selangor, memberi sokongan kepada kumpulan pengganas Islamic State

dengan menjadi ahli kepada kumpulan Islamic State tersebut. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 130J(1)(a) Kanun Keseksaan dan boleh dihukum di bawah seksyen 130J Akta yang sama.

The Alternative Charge

Bahawa kamu antara 28.12.2013 hingga 7.4.2014 dengan pengetahuan, telah memasuki Syria dengan menaiki pesawat melalui Lapangan Terbang Antarabangsa Kuala Lumpur di dalam Daerah Sepang, dalam Negeri Selangor, memberi sokongan kepada berlakunya perbuatan pengganas yang melibatkan penggunaan senjata api dan perbuatan itu dilakukan dengan niat untuk melanjutkan suatu perjuangan ideologi dan perbuatan tersebut boleh semunasabahnya dianggap sebagai diniatkan untuk mengugut orang awam di Syria. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 130J(1)(b) Kanun Keseksaan dan boleh dihukum di bawah seksyen 130J Akta yang sama.

Hukuman

Sekiranya disabitkan dengan kesalahan, hendaklah dihukum penjara seumur hidup atau penjara selama tempoh tidak melebihi 30 tahun, atau denda, dan boleh dirampas mana-mana harta yang telah digunakan atau diniat untuk digunakan bagi melakukan kesalahan itu.

Statement Of Facts And Sentence

[2] The respondent pleaded guilty to the alternative charge. The statement of facts was tendered. It is reproduced below:

Facts of case

1. Keterangan menunjukkan bahawa pada 28 Disember 2013 tertuduh telah berlepas dari Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA) ke Istanbul, Turki. Tertuduh kemudian telah memasuki Syria melalui Turki dan telah berada disana sehingga kembali semula ke Malaysia pada 7 April 2014 melalui KLIA.

2. Tertuduh telah berlepas ke Syria melalui Turki bersama rakan-rakannya warganegara Malaysia iaitu Mohamad Fauzi bin Misrak (juga dikenali sebagai Abu Dayan), Mohamad Naim bin Abd. Rashid (juga dikenali sebagai Abu Naim) dan Aqif Heusen bin Rahizat (juga dikenali sebagai Abu Suffian). Setelah sampai di Turki, tertuduh dan 3 rakannya Mohamad Fauzi bin Misrak (Abu Dayan), Mohamad Naim bin Abd. Rashid (Abu Naim) dan Aqif Heusen bin Rahizat (Abu Suffian) kemudiannya telah melalui jalan darat untuk memasuki Syria.

3. Sebelum berlepas ke Syria, tertuduh telah menjual sebidang tanah kepada abang iparnya yang bernama Ahmad bin Abdullah dengan nilai sebanyak RM10,000 pada 24 Disember 2013. Tertuduh kemudian telah menerima wang secara tunai sebanyak RM5,000 yang telah digunakan untuk membiayai perjalanan beliau ke Syria. Baki wang penjualan tanah tersebut kemudian cuma diberikan pada awal April 2015.

A

4. Keterangan juga menunjukkan bahawa tertuduh telah meminta pertolongan rakannya yang berada di Malaysia iaitu penama Hazini bin Hamid untuk memasukkan wang pemberian Ahmad bin Abdullah ke dalam akaun penama A'aidah binti Saiddudin sebanyak RM2,700 dan RM1,000 pada 5 April 2016. Wang sebanyak RM3,700 tersebut telah digunakan oleh tertuduh untuk membiayai tiket dan kos perjalanan balik
B ke Malaysia melalui Turki oleh tertuduh dengan menggunakan penerbangan Malaysia Airlines.

5. Keterangan juga menunjukkan bahawa tertuduh telah memberi sokongan dan telah memainkan peranan serta bernaung didalam kumpulan pengganas Islamic State (IS) semasa berada di Syria. Walau
C bagaimanapun, tertuduh tidak berbaiah kepada kumpulan IS tersebut.

6. Selain itu, tertuduh dan rakan-rakannya juga telah melakukan Ribat iaitu Sentri bagi menjaga kawasan rumah penginapan para mujahidin. Tertuduh juga dibekalkan dengan senjata api yang dibekalkan oleh IS iaitu jenis AK-47.

D

7. Semasa berada di Syria, tertuduh juga telah menjalani latihan ketenteraan bersama-sama rakannya yang merupakan warganegara Malaysia iaitu Mohamed Naim bin Abd. Rashid. Tertuduh juga telah memberitahu rakan-rakannya yang bernama Hazini bin Hamid dan Muhammad Annuar bin Man bahawa beliau menyertai peperangan semasa berada di Syria dan pernah melepaskan tembakan.

E

8. Tertuduh juga telah memberitahu dan memuatnaik gambar-gambar semasa beliau berada di Syria antara 28 Disember 2013 sehingga 7 April 2014 di dalam akaun laman sosial "Facebook" milik beliau yang bernama "Oltimet Wo Rio" dan didaftarkan di dalam pengkalan data Facebook sebagai "oltimet rio".

F

9. Sementara berada di Syria, tertuduh juga sering berhubungan dengan rakannya yang bernama Muhammad Annuar bin Man melalui aplikasi "whatsapp" semasa berada di Syria. Didalam perbualan tersebut, tertuduh telah memaklumkan bahawa beliau telah dibekalkan dengan senjata api semasa berada di Syria. Tertuduh juga berkongsi gambar dengan
G Muhammad Annuar bin Man melalui aplikasi "whatsapp" tersebut. Tertuduh juga telah memberitahu penama Hazini bin Hamid bahawa beliau telah menyertai beberapa siri peperangan melibatkan penggunaan senjata api untuk menentang pemerintahan Rejim Bashar Al Assad semasa berada di Syria.

H

10. Berdasarkan kepada keterangan yang ada, tertuduh telah melakukan kesalahan memberikan sokongan kepada Kumpulan Pengganas Islamic State dengan cara bernaung di bawah kumpulan pengganas tersebut walaupun tidak berbaiah kepada kumpulan tersebut. Keterangan juga menunjukkan bahawa tertuduh telah memberikan sokongan kepada berlakunya perbuatan pengganas yang melibatkan penggunaan senjata api.
I Perbuatan tersebut telah dilakukan dengan niat untuk melanjutkan suatu perjuangan ideologi yang semunasabahnya dianggap sebagai diniatkan untuk mengugut orang awam di Syria. Oleh yang demikian, tertuduh telah melakukan suatu kesalahan di bawah seksyen 130J(1)(b) Kanun Keseksaan yang boleh dihukum di bawah seksyen peruntukan yang sama.

[3] The statement of facts was marked as exh. P4. The learned deputy then tendered the following documentary evidence namely:

List of Exhibits

(1)	Borang senarai G geledah (2 senarai)	
	(a) Senarai Geledah - Bandar Baharu 1257/14	P5
	(b) Senarai Geledah - THSL/019647/14	P6
(2)	Gambar tempat kejadian - (64 keping)	P7(1)-(64)
(3)	Sijil Seksyen 90A Akta Keterangan	P8
(4)	Gambar Passport (5 keping)	P9(1)-(5)
(5)	Sijil Seksyen 90A Akta Keterangan	P10
(6)	Rekod Pergerakan. Rekod Keluar Masuk	P11(1)-(4)
(7)	Penyata A/C Akaun Ai'dah bt Saiduddi	P12(1)-(15)
(8)	Maklumat Akaun Facebook	
	(a) Certificate Relating to Foreign Evidence	P13
	(b) Form 2 MACA (3 copies)	P14(a)(b)(c)
	(c) CD - Islamic St. MLAT (8/12/2015)	P15
(9)	Laporan MCMC	P16
(10)	Pen Drive DF2014-DEC-04-12. Secret TD01	P17
(11)	Laporan Polis - THSL/019647/14	P18
(12)	Laporan Tangkap - Serdang (KH)/3230/14	P19
(13)	Laporan Pembetulan - Bandar Baru 1256/14	P20
(14)	Laporan Rampasan Barang Kes - Bandar Baru 1257/14	P21
(15)	Bandar Baru Report 1258/14	P22
(16)	Salinan Pasport No. A 30934402	P23

[4] Having accepted the respondent's plea of guilty, he was convicted under the alternative charge of giving support to the commission of a terrorist act under s. 130J(1)(b) of the Penal Code which carries a mandatory term of imprisonment for life or imprisonment for a term not exceeding 30 years or with fine, and shall also be liable to forfeiture of any property used or intended to be used in connection with the commission of the offence.

Mitigation

[5] Thereafter learned counsel for the respondent advanced his mitigation and followed by the rebuttal by the learned deputy.

(1) 38 tahun,
(2) Semasa ditangkap - 36 tahun,
(3) Kerja - Tukang rumah, RM90-RM100 sehari,
(4) Belum kahwin,

A (5) Anak ke 9 daripada 10 beradik,
(6) Both parents - meninggal dunia,
(7) SPM - pelajaran,
(8) OKT ditangkap pada 27/11/2014 (3 bulan selepas balik ke Malaysia daripada Syria),
B (9) Faktor PG before trial,
(10) Menjimat masa Mahkamah,
(11) Jika bicara, masa yang panjang,
(12) Jimat kos saksi,
C (13) Pesalah pertama,
(14) Tiada kesalahan jenayah,
(15) Pohon peluang diberikan kepada OKT supaya lebih berhati-hati,
(16) Masa depan untuk baiki,
(17) OKT kesal dan insaf,
D (18) Terpengaruh dengan rakan-rakan,
(19) Mendapati perjuangan menyimpang daripada garis Islam - balik serta merta,
(20) Tidak pernah berbaiah (bersumpah) dengan IS, menunjukkan OKT lebih berhati-hati. Setelah menyedari kesilapan itu, OKT balik ke
E Malaysia OKT tidak bergiat lagi dengan IS,
(21) Pohon hukuman ringan, OKT tak bunuh sesiapa,
(22) Tiada hukuman penjara, had penjara minimum,
(23) Rakan-rakan OKT yang PG di bawah seksyen yang sama yang pergi bersama OKT ke Syria telah PG - 4 1/2 tahun bermula daripada
F tarikh tangkap, dan
(24) Penjara mula tarikh tangkap (27/11/2014).

Rebuttal By Learned Deputy

(1) Fakta kes,
G (2) Serius - 30 tahun,
(3) Kesalahan keselamatan,
(4) OKT akui berada di Syria;
(5) Jalani latihan ketenteraan,
(6) Tidak berbaiah - bantu perang mujahidin,
H (7) Dibekalkan dengan senjata,
(8) Menyertai kumpulan yang salah,
(9) Menyertai peperangan, dan
(10) Pohon hukuman berat.

I **[6]** Having considered the mitigation, the rebuttal by learned deputy and the surrounding circumstances of the case, the trial judge sentenced the respondent to five years' imprisonment commencing from the date of arrest on 27 November 2014.

[7] No appeal was filed by the respondent on the sentence imposed on him. However, the appellant (prosecution) was dissatisfied with the adequacy of the sentence and filed an appeal to this court. Upon hearing the appeal on 10 August 2016, we set aside the trial judge's sentence of five years' imprisonment and in its place, we substituted it with 12 years' imprisonment with effect from the date of arrest on 27 November 2014.

Two Notices Of Appeal To The Federal Court

[8] The respondent was aggrieved by the enhancement of his sentence. The respondent himself, through the prison authority, on 19 August 2016 filed an appeal not only on sentence, but also on conviction, despite having unequivocally pleaded guilty to the charge.

[9] About four days later, the respondent's learned counsel filed another notice of appeal on 23 August 2016. This time the appeal was directed at the sentence only.

[10] The conviction of the respondent was never appealed against and canvassed before us. The appeal before us was solely by the prosecution and it was only on sentence. As the respondent has pleaded guilty and had been convicted on that plea, "there shall be no appeal except as to the extent or legality of the sentence": see s. 305 of the Criminal Procedure Code. That being the case, we propose to deal with the issue of sentence only in this judgment.

The Decision Of The High Court

[11] In imposing the sentence as he did, the trial judge had appreciated and addressed himself on the general principles of sentencing. Several case laws were cited and referred to namely, *R v. Sargeant* (1974) 60 Cr App R 74, *PP v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315, *R v. Ball* (1951) 35 Cr App R 164, *R v. Ipeelee* [2012] 1 SCR 433, *Yusmarin Samsudin v. PP* [1999] 4 CLJ 391, *PP lwn. Abdul Halim Ishak & Satu Lagi* [2013] 9 CLJ 559 dan *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256.

[12] In sentencing the respondent to five years' imprisonment, the trial judge took into consideration the circumstances of the case and the mitigating factors advanced on behalf on the respondent. The trial judge wrote in his judgment at pp. 33 and 34, paras. 26 and 27 of rekod rayuan, jilid 1 as follows:

> 26. Dalam menentukan tempoh pemenjaraan yang bersesuaian terhadap tertuduh, Mahkamah ini juga telah mengambilkira fakta serta keadaan yang berlaku dalam kes ini serta faktor-faktor mitigasi yang memihak kepada tertuduh. Sungguhpun keterangan menunjukkan bahawa tertuduh telah memberikan sokongan dan telah memainkan peranan serta bernaung didalam kumpulan pengganas Islamic State semasa berada di Syria, **tetapi tertuduh sendiri tidak pernah berbaiah (bersumpah) kepada kumpulan Islamic State** tersebut. Keadaan ini jelas menunjukkan bahawa tertuduh lebih berhati-hati dan setelah menyedari kesilapan yang

dilakukan itu serta penglibatannya yang selama ini hanyalah suatu penganiayaan dan sia-sia, maka **tertuduh telah membuat keputusan untuk pulang segera ke Malaysia dan tidak lagi bergiat dengan kumpulan Islamic State**. Walaupun terdapat satu perancangan yang rapi, ianya tidak dilakukan oleh tertuduh sendiri tetapi telah diatur sedemikian rupa oleh pihak rakan-rakannya iaitu Mohamad Fauzi bin Misrak (dikenali sebagai Abu Dayyan), Mohamad Na'im bin Abd. Rashid (dikenali sebagai Abu Naim) dan Aqif Heusen bin Rahizat (dikenali sebagai Abu Suffian). Mahkamah ini akur bahawa melalui fakta-fakta kes, tertuduh juga menjalani latihan ketenteraan bersama-sama rakannya semasa berada di Syria. Tertuduh juga dikatakan telah menyertai peperangan semasa berada di Syria dan melepaskan tembakan, tetapi Mahkamah ini tiada mendapati apa-apa fakta yang menjuruskan kepada perbuatan dan kesalahan yang dilakukan oleh tertuduh itu mempengaruhi mana-mana pihak di negara ini untuk menyertai perjuangan di Syria.

27. *Mahkamah juga mengambil kira bahawa rakan-rakannya yang bersama-sama dengannya juga telah dituduh di lain-lain Mahkamah atas kesalahan yang sama dan membuat pengakuan bersalah. Yang Arif Hakim telah menjatuhkan hukuman 4 tahun setengah daripada tarikh tangkap*. Mahkamah ini turut mengambil kira kes Mahkamah Agong *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ 209,

> in assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering firstly, the gravity of the type of offence committed, secondly, the facts in the commission of the offence, thirdly, the presence or absence of mitigating factors and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentence in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence (emphasis added).

[13] On the respondent's antecedent, the trial judge may be correct to say that the respondent was a first offender (pesalah pertama), but certainly His Lordship was incorrect to say that the respondent was a youthful offender (pesalah muda) as he was about 30 years old at the time of the commission of the offence. Based on the said incorrect premise, the trial judge opined that a longer imprisonment term was not suitable and good for the society and public interest. His Lordship was of the view that the public interest was better served if the respondent was not sent to a long period of incarceration. A shorter term of imprisonment had achieved its purpose to rehabilitate the respondent and for the good of the public at large. His Lordship at pp. 36 and 37, para. 30 wrote as follows:

> Saya berpandangan bahawa kepentingan awam lebih terjaga dan terpelihara sekiranya tertuduh tidak dipenjarakan untuk suatu tempoh yang terlalu lama. Tempoh pemenjaraan yang singkat, pada hemat saya telah mencapai matlamat memberi pengajaran serta pemulihan kepada masyarakat umum dan juga tertuduh.

[14] The general rule is that any unfair and unjust sentences amongst two or more accused persons should be avoided. The sentences amongst co-accused must ordinarily be the same. However, there are cases where disparity of sentences are readily recognised by our criminal courts: see *PP v. Ravindran & Ors* [1992] 1 LNS 47; [1993] 1 MLJ 45 and *PP v. Nazarudin Ahmad & Ors* [1993] 2 CLJ 543; [1993] 2 MLJ 9. A range of sentences imposed may depend on a number of considerations, *inter alia*, the differences in their mitigation, the role played by each of the accused persons and the degrees of culpability, their antecedents etc. The following principles are stated by Thomas in *Archbold* 1993:

> Where two or more offenders are to be sentenced for participation in the same offence, the sentences passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances. If there are reasons for imposing a particular form of sentence … on one which does not apply to the other, it is not necessarily wrong to make such an order in respect of one and impose a sentence of imprisonment on other: (paras 5-169).

[15] In assessing the length of the custodial sentence (excluding imprisonment for life) imposed on the respondent, the trial judge had taken into account the length of the imprisonment term meted out by other criminal courts on the respondent's colleagues who pleaded guilty on charges of similar offences. The sentence passed was 4 1/2 years each from the date of arrest. We do not agree with the trial judge. On our part, we recognised that firstly, there can be disparity of sentences amongst co-accused persons, depending on their responsibility for the crime and their personal circumstances: see *Ravindran & Ors*, (*supra*) and *Nazarudin Ahmad & Ors*, (*supra*). Secondly, the role played by the respondent was disclosed in the statement of facts, exh. P4, whilst the roles of the respondent colleagues and their antecedents were not disclosed and canvassed before us.

[16] Finally, the trial judge was persuaded with learned counsel's submission where His Lordship was referred to the judgment of Kamardin Hashim J (as he then was) in *PP lwn. Ummi Kalsom Bahak* [2015] 7 CLJ 503 where the accused pleaded guilty to a charge under s. 130J(1)(a) of the Penal Code, read with s. 511 of the same where she was sentenced to two years jail. On appeal to the Federal Court, the sentence was affirmed. The factual circumstances in *Ummi Kalsom Bahak*'s case and its mitigating factors taken into account by the trial judge are produced below:

> Kesalahan yang telah dilakukan oleh tertuduh adalah satu jenayah yang masih belum muktamad. Walaupun terdapat satu perancangan yang rapi, ianya tidak dilakukan oleh tertuduh sendiri, tetapi telah diatur sedemikian rupa oleh pihak Afiq Huesen bin Rahizat. Selain itu latar belakang keluarga tertuduh telah mendorong beliau untuk berkahwin dengan penama tersebut dan telah terpengaruh dengan dakyah kumpulan IS. Tertuduh telah mengalami kegagalan dalam pelajaran di peringkat universiti dan tidak mendapat kasih sayang ibunya yang telah meninggal

dunia lebih awal menyebabkan tertuduh mudah terpengaruh. Umur tertuduh yang masih muda (25 tahun masa kejadian) menyebabkan tertuduh tidak begitu matang serta berfikiran suntuk untuk memikirkan akibat daripada perbuatannya.

The Appeal

[17] In this appeal, learned deputy canvassed several grounds of appeal in her oral and written submission before us. In praying for a deterrent sentence, learned deputy submitted as follows:

(1)(i) Hukuman yang dijatuhkan Mahkamah perlulah mencerminkan keseriusan masalah penularan kegiatan keganasan;

(ii) Usaha memerangi keganasan perlu seiring dengan usaha agensi-agensi lain di Malaysia;

(iii) Seharusnya tidak wujud rangkaian keganasan di Malaysia;

(iv) Isu keganasan adalah masalah global. Ia bukan satu isu yang terasing.

(2) The public interest is important and shall be given priority: see *PP v. Loo Choon Fatt* [1976] 2 MLJ 256.

(3) The trial judge appeared to have taken the respondent's personal interest more than the public interest. This is reflected in His Lordship judgment at paragraph 30.

(4) The respondent was actively trained in Syria on IS militancy or jihad and propagated the ideology on the social Facebook.

(a) Menjalani latihan ketenteraan bersama rakan-rakannya yang lain;

(b) Menyertai beberapa siri peperangan semasa berada di Syria dan pernah melepaskan tembakan;

(c) Memuat naik gambar-gambar semasa responden berada di Syria antara 28 Disember 2013 hingga 7 April 2014 dalam akaun laman social Facebook.

(5) The terrorist activities had happened on our own backyard when the Movida club in Puchong, Selangor was attacked with the hand grenade on the wee hours on 28.6.2016. Several members of the public were injured. Before that, the militant IS attacked in the centre of Jakarta on 14.1.2016 where 8 lives were loss (including 4 bombers suicide) and injured 23 civilians. If the terrorist acts are not snip during its embryonic stage, it will definitely cause a serious threat to the peace and security of this country. Recently, there were a number of arrests of IS militants and supporters across the country before they could attack the places where the members of public gathered and assembled. One of such a plot was to launch attacks during our recent Merdeka-eve celebrations. Fortunately at the moment the intelligence services of the Counter Terrorism Unit of the Royal Malaysian Police Force are on top of the situation.

(6) The respondent had participated in the war in Syria using firearms - contributed to the carnage and turmoil and placed public lives in chaos.

Our Decision

[18] We are aware that the power of sentencing given to a trial court is discretionary and in order to disturb the sentence imposed, an appellate court must be convinced that the trial judge had erred in applying the correct principles of sentencing or had embarked on some unauthorised or extraneous exercise of discretion: see *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83 and *Ganesan Nachiappan & Ors v. PP* [2000] 3 CLJ 302.

[19] On pleading guilty, an accused is normally given credit or discount between one-quarter and one-third of what otherwise would have been the sentence: see *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167. In this case, it would appear that the trial judge had exercised his discretion to grant the discount to the respondent, though the percentage of the discount was not indicated. However, not in every case of pleading guilty, the accused is entitled as a rule of thumb to an automatic reduction of sentence. In the case of *Costen* (1989) 11 Cr App R (S) CA 182, Lord Lane CJ said as follows:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount.

[20] The gist of the charge against the respondent is his involvement in the jihadist, militant movement of the IS. Its movement has been characterised by extreme violence and suicide bombings. It is a menace to the international community and its threat and extremist religious ideologies are no exception to Malaysia, which has a population of about 31 million, and 60 percent are Muslims. It is believed that there are about 200-250 IS fighters from Malaysia in the Middle East such Syria, Iraq and Turkey. One of the IS militant leaders based in Syria is a young Malaysian, Muhammad Wanndy Mohamed Jedi. He was responsible to orchestrate and direct the attacks in Malaysia. According to an article entitled "*Malaysia: Clear and present danger from the Islamic State*" by James Chin - Wednesday, December 16, 2015, there was a meeting between the militant groups of the IS, Abu Sayyaf and the Moro National Liberation Front (MNLF) in Sulu. At the meeting, several resolutions were passed, including the attacks in Malaysia, in particular Kuala Lumpur and Sabah. This chilling information shocked us and foreigners living in Malaysia. Indeed the first attack by the militant in Malaysia was the grenade attack at the Movida Club in Puchong, Selangor on 28 June 2016. In this early hours attack, it targeted the members of the

public who watched Euro football 2016. We are mindful that the charge against the respondent was between the years 2013 to 2014. The IS militant attack is serious and real. The threat by the IS militant in this country was never appreciated and considered by the trial judge. His Lordship was satisfied that the respondent had ceased his ties with the IS, he felt remorse and promptly returned to Malaysia. He was arrested a few months later after returning from Syria, by then his was "stale" or a spent force, so to speak. In other word, he was a reformed IS militant. That may be so, but we must bear in mind that the IS militants are fighting a religious war. They are die-hard fighters who are extremely difficult to deradicalise as the English idiom says "a leopard does not change its spots."

[21] The trial judge was content to emphasise on the case of *Ummi Kalsom Bahak*, *supra*. The brief facts are these. She was apprehended at the Immigration counter at KLIA2 en route to Brunei, Istanbul and Syria to marry an IS militant, Muhammad Aqif. She was also charged with an offence under s. 130J(1)(a) of the Penal Code, read with an offence of attempt to commit an offence under s. 511 of the same Code. For an offence of attempt to commit an offence, "any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence", in which case, the longest term would be 15 years' imprisonment. Kamardin Hashim J (as he then was) correctly recognised this. His Lordship expressed as follows:

> Walau bagaimanapun, bagi pertuduhan pilihan yang mana tertuduh telah disabitkan, seksyen 511 Kanun Keseksaan menetapkan hukuman maksima bagi kesalahan cubaan (attempt) adalah separuh daripada hukuman maksima yang telah diperuntukkan bagi kesalahan itu. Dalam kes terhadap tertuduh disini, tertuduh boleh dihukum penjara maksima 15 tahun atau dihukum denda dan harta benda yang berkaitan boleh dirampas. Walaupun hukuman bagi kesalahan yang telah dilakukan oleh tertuduh tidak menetapkan hukuman pemenjaraan secara mandatory, namun memandangkan keseriusan kesalahan berkaitan dengan unsur keganasan, adalah wajar hukuman pemenjaraan dikenakan bagi memberikan tauladan kepada masyarakat umum supaya menjauhi kesalahan seumpama ini. Kepentingan awam hendaklah diberikan keutamaan dalam menghadapi kesalahan yang melibatkan keganasan tanpa mengira keganasan tersebut berlaku di dalam negara mahupun di luar negara. Kepentingan awam hendaklah dalam keadaan kes ini sentiasa mengatasi kepentingan seseorang tertuduh.

[22] In imposing the sentence of five years' imprisonment on the respondent, the trial judge was persuaded and influenced by a lenient sentence passed on Ummi Kalsom Bahak. The maximum term imposable on the respondent is 30 years, whilst the maximum term applicable to Ummi Kalsom Bahak is 15 years: see the discussion in para. 21 above. The factual matrix in the case of *Ummi Kalsom Bahak*, cannot be used as a barometer to gauge for the imposition of a proper custodial sentence on the respondent. The background facts in the respondent's case is that he was at least a former IS "fighter and combatant", whereas in *Ummi Kalsom Bahak*'s case, the

offence was giving support to the commission of a terrorist act. The offence of giving support to terrorism is yet to be completed - an inchoate offence. She was arrested at KLIA2, Sepang before stepping her foot in Syria where she intended to marry her lover, an IS militant, Muhammad Aqif. She did not receive an army training and did not participate in the battle using firearms. Neither was there, evidence to show that she had the know-how to handle weaponry. That being the case, we do not agree that the case of *Ummi Kalsom Bahak* is a persuasive authority on sentence against the respondent. There cannot be any comparison between *Ummi Kalsom Bahak*'s case and the respondent's case as they are distinguishable and different like chalk and cheese.

[23] The trial judge also erred when His Lordship was of the view that the prosecution will face a very difficult task to collect the evidence from Syria and Istanbul to prove the charge against the respondent in the event of a full trial (p. 36 at para. 29 of rekod rayuan, jilid 1). A similar view was adopted by the trial judge in the Court of Appeal case of *PP v. Mohd Fazelan Md Khuzesh* [2015] 9 CLJ 221 (B-5(S)-77-03-2015). This court said that such proposition by the High Court Judge was "a pure conjecture and unwarranted."

[24] Though the respondent herein did not formalise or sworn (berbaiah) his allegiance with the terrorist group IS, but he was willing to fork out his own money to go to Syria. While in Syria for about three months, together with his comrades, he attended an army training and participated in series of battles using firearms against President Bashar Al-Assad's regime. He also performed sentry duty at the housing area of the jihadists.

[25] The respondent was also actively involved on social media application using the name of "Oltimet Wo Rio" by downloading his pictures to inspire and entice new supporters or sympathisers. The respondent too in his "WhatsApp" application liased with his fellow Malaysian friends, Muhammad Anuar bin Man and Hazini bin Hamid, sharing his pictures and information on the IS activities in Syria between 28 December 2013 and 7 April 2014.

[26] It has been accepted that the sentence passed must take into account the public interest factor. All the more so when the crime involved violence and horrific acts of cruelty by IS militant. This must be the number one factor to be placed in the mind of the sentencing court. The sentence imposed must not only serve as a deterrence to the respondent but also to deter others from joining or supporting the IS terrorist acts or suicide bombings and terrorism. An often cited case of public interest factor was the decision of Hilbery J in *R v. Ball* 35 Cr App R 164 where His Lordship had expressed his views as follows:

> The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public serves the public

A interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the
B offender is induced to turn from criminal ways to honest living.

[27] We now propose to examine the sentences meted out by our court in relation to offences under the Penal Code under Bab VIA - "Offences Relating to Terrorism" to determine the trend of sentencing policy. In *PP v. Muamar Gadaffi Mohamad Shafawi* (Court of Appeal Criminal Appeal No:
C W-05(H)-87-02-2016), the offence was under s. 130F of the Penal Code. The accused opened an account with the social Facebook in the name of "Iskandar Dzulqarnain IS" on 16 May 2012. Its purpose was to propagate militant IS ideology to friends on the social website. The accused also opened a second account on the Facebook in the name of "Ammar Rasuli Al-Zihadi"
D for the same purpose. Upon pleading guilty, the High Court Judge sentenced the accused to five years' imprisonment. On appeal, on 25 April 2016, this court allowed the prosecutor's appeal and set aside the sentence imposed by High Court. The accused was sentenced to 15 years' imprisonment from the date of arrest.

E **[28]** In *PP v. Rohaimi Abd Rahim & Satu Lagi* (Court of Appeal Criminal Appeal No: W-05(H)-83-02-2016), the accused was charged with an offence under s. 130G(c) of the Penal Code against the first respondent. Whilst the second respondent was charged for abetment under s. 109 of the Penal Code read with s. 130G(c) of the same Code. Both the first and second respondents
F were also charged under s. 130P of the Penal Code, read together with common intention under s. 34 of the same Code. The first and second respondents pleaded guilty and the trial judge sentenced the accused to three years' imprisonment from the date of arrest in respect of the offence under s. 130G(c). In respect of the offence under s. 130P read with s. 34, both
G respondents were sentenced to two years' imprisonment. On appeal, this court on 21 June 2016 allowed the appeal and set aside the sentence imposed by the High Court. The accused's sentence was enhanced to 15 years' imprisonment effective from the date of arrest (the sentences were to run concurrently).

H **[29]** In *PP v. Mohd Anwar Azmi & Yang Lain* (Court of Appeal Criminal Appeal No: 45-50-46-16-2015), the accused persons were charged with an offence under s. 130G(a) of the Penal Code. After a full trial, the accused persons were found guilty, convicted and sentenced to 25 years' imprisonment.

I

[30] We were in agreement with learned deputy that the conduct of the respondent in supporting the IS militant group is a very serious criminal offence. It should reflect the public abhorrence against such crime and warrant a severe punishment. In *PP lwn. Abdul Halim Ishak & Satu Lagi* [2013] 9 CLJ 559, the court said, *inter alia*:

> … denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part its aims are similar to that of deterrence, it has also been seen to be associated with retribution.

Conclusion

[31] Having regard to the facts and circumstances of this case, learned deputy and learned counsel's oral and written submission and the established principles on sentencing, in particular the public interest factor where Malaysia is a primary target location for IS terrorists' attacks, we cannot compromise with their terrorism activities and the sentence to be imposed must not merely be a tap on the wrist. We do not agree with the trial judge that the respondent's plea of guilty and the Abdullah Ang's discount should be extended to the respondent and the sentence of five years' imprisonment imposed by him was manifestly inadequate.

[32] We, therefore, unanimously set aside the sentence of five years' imprisonment imposed by the High Court and accordingly substituted it with an imprisonment term of 12 years with effect from the date of arrest on 27 November 2014.